Supreme Court, U. S.
FILED
OCT 12 1978
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-475

BERNARD ALLEN FRIED, JOAN FRIED, COMMUNITY REDEMPTION CORPORATION, an Illinois Corporation and CHEROKEE LANDS CORPORATION, an Illinois Corporation,

Petitioners,

vs.

BERNARD CAREY, Individually and as State's Attorney of Cook County, Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-7940,
Attorney for Respondent.

PAUL P. BIEBEL, JR.,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

JOHN A. DIENNER, III,
Assistant State's Attorney,
Of Counsel.

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

PAGE

Citations of Authority i

Questions Presented for Review 1

Statement of the Case 2

Statement of the Facts 2

Reasons for Denying the Writ:

I.

The Plaintiffs-Appellants Have Wholly Failed To Allege Any Facts That Would Avoid The Consequences Of 28 U.S.C. §1341 3

II.

The Complaint Wholly Fails To Allege Facts To Demonstrate The Presence Of Any Irreparable Injury, The Absence Of Which Forecloses The Granting Of Extraordinary Relief 7

III.

The Plaintiffs-Appellants Have Alleged No Facts That Would Foreclose The Application Of Younger v. Harris And Huffman v. Pursue And The Dismissal Of This Action 9

Conclusion 11

CITATIONS OF AUTHORITY

Cases

City of East St. Louis v. State Trust Co., 372 Ill. 120 (1939) 7
County of Champaign v. Hanks, 41 Ill. App. 3d 679 (1976) 9
Douthett v. Kettle, 104 Ill. 356 (1882) 7
Douthett v. Winter, 108 Ill. 300 (1884) 6
French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970), cert. den. 401 U.S. 915 5
Hickman v. Wujick, 488 F.2d 875 (2nd Cir. 1973) 5
Huffman v. Pursue, 420 U.S. 592 (1975) 2, 9, 10, 11
Judice v. Vail, 97 S.Ct. 1211 (1977) 11
Kamsler v. M.F.I. Corp., 359 F.2d 752 (7th Cir. 1966) .. 5
Kelly v. Springett, 527 F.2d 1090 (9th Cir. 1975) 6
Massachusetts State Grange v. Benton, 272 U.S. 525 (1926) 10, 11
People v. Kimmell, 323 Ill. 261 (1926) 9
Trainor v. Hernandez, 97 S.Ct. 1911 (1977) 11
28 East Jackson Enterprises, Inc. v. Cullerton, 523 F. 2d 439 (7th Cir. 1975) 5
U.S. ex rel. Hoge v. Bolringer, 211 F. Supp. 197, aff'd 311 F.2d 215 (3rd Cir. 1962), cert. den. 372 U.S. 931 .. 5
Wilson v. County of Marshall, 257 Ill. App. 220 (2nd Dist. 1930) 9
Younger v. Harris, 401 U.S. 37 (1971) 2, 9, 10

Statutes

28 U.S.C. §1341 ..... 1, 3, 5, 9, 11
Ch. 14, §5, Ill. Rev. Stat. (1977) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-475

BERNARD ALLEN FRIED, JOAN FRIED, COMMUNITY REDEMPTION CORPORATION, an Illinois Corporation and CHEROKEE LANDS CORPORATION, an Illinois Corporation,

Petitioners,

vs.

BERNARD CAREY, Individually and as State's Attorney of Cook County, Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioners have alleged facts sufficient to avoid the application of 28 U.S.C. §1341.

2. Whether the Complaint alleges sufficient facts to demonstrate the existence of irreparable injury.

3. Whether the Petitioners have alleged sufficient facts to avoid the application of *Younger* v. *Harris* and *Huffman* v. *Pursue.*

STATEMENT OF THE CASE

Plaintiffs-Petitioners filed a declaratory and injunctive relief action asserting 28 U.S.C. §1343(3) as the sole statutory basis for their action. The defendant-respondent moved to dismiss the action asserting a failure of the complaint to state a claim upon which relief may be granted, the bar of 28 U.S.C. §1341; abstention; and other defenses. The motion was fully briefed and ultimately granted by the District Court on December 9, 1977. Plaintiff filed a notice of appeal on December 29, 1977. The United States Court of Appeals for the Seventh Circuit affirmed the dismissal on June 26, 1978.

STATEMENT OF THE FACTS

The sole facts properly before this court are those specifically contained in the complaint and the affidavit attached to the defendant's responsive pleading. Basically, the plaintiffs allege that for altruistic reasons they acquired a large number of parcels of real estate for the purpose of providing housing to the disadvantaged and for

stemming the general moral decay of the City of Chicago. Whether the plaintiffs are, in fact, slumlords as is put in issue by the complaint is not necessary to determine for purposes of this appeal.

The gist of the complaint is that historically the State's Attorney's Office used to settle claims on tax delinquent property at less than face value. This practice ceased and the present State's Attorney has filed eighty-six suits (as of April 21, 1977) seeking personal judgments against the owners of tax delinquent real estate for the years that they owned the property. Plaintiffs assert that this is a discriminatory enforcement of the laws and is subject to injunction. Plaintiffs herein are defendants to some of the pending state court actions.

REASONS FOR DENYING THE WRIT

I.

THE PLAINTIFFS-APPELLANTS HAVE WHOLLY FAILED TO ALLEGE ANY FACTS THAT WOULD AVOID THE CONSEQUENCES OF 28 U.S.C. §1341.

The plaintiffs before this court are defendants to some of the pending state court actions. In order to avoid the application of 28 U.S.C. §1341, they must allege, by well pleaded facts, that their remedies in those state proceedings are inadequate for not being plain, speedy or efficient. Not one such fact is pleaded.

The bottom line to plaintiffs' complaint is that they cannot pay less than face value on their taxes as they once did. Nowhere in the complaint is it alleged that the taxes are

not, in fact, due and owing. The assessment procedure is not attacked as illegal. The plaintiffs' only complaint is that the State's Attorney has started to sue for and demand the whole amount due for the years in question rather than agree to a lesser amount. They also complain that they are sued for taxes only for the years that they owned the property. This court is left to speculate how plaintiffs are thereby damaged.

Stripped of self-laudatory and conclusory allegations, the complaint fails to state a claim upon which relief may be granted. Plaintiffs own some parcels of property which are admittedly in arrears on taxes. Plaintiffs have alleged no efforts on their part to reduce their tax burden as provided for by law. Instead they follow the expediency of simply not paying their taxes.

Plaintiffs, in their efforts to establish a discriminatory enforcement, point to the fact that not every parcel of forfeited property has been made subject to suit. In paragraph 8 of the complaint plaintiffs assert that there are over 100,000 such parcels. Plaintiffs apparently take the position that unless 100,000 suits for taxes are prosecuted simultaneously by the State's Attorney's Office, the United States Constitution is offended. The defendant had filed 86 suits as of April 21, 1977. It would be absurd to believe that this court is going to dictate to the defendant how many suits he must prosecute at one time. Defendant Carey is going to file as many as he deems appropriate at any given time. That exercise of discretion cannot be fettered by plaintiff.

Plaintiffs' purported due process claims are equally frivolous. Suits are filed in the Circuit Court of Cook County, the plaintiffs are given notice and an opportunity

to be heard. Due process requires no more. It is not a magical incantation that serves as a defense to legal claims. It must relate to a procedural defect in the complained of proceedings. Plaintiffs make no due process claim which is supported by well pleaded facts. Absent properly pleaded allegations of deprivations of federal constitutional rights, privileges or immunities, this court has no jurisdiction to proceed. *Kamsler* v. *M.F.I. Corp.*, 359 F.2d 752 (7th Cir. 1966). Vague allegations invoking the popular and oft repeated conclusory claims of denials of federally protected rights do not state a claim upon which relief may be granted. Conclusory allegations of the denial of federal rights, unsupported by well pleaded facts, are insufficient to state a claim. *French* v. *Corrigan*, 432 F.2d 1211 (7th Cir. 1970) *cert. den.* 401 U.S. 915. *See also, U.S. ex rel. Hoge* v. *Bolringer*, 211 F. Supp. 199, *aff'd* 311 F.2d 215 (3rd Cir. 1962), *cert. den.* 372 U.S. 931.

28 U.S.C. §1341 succinctly states:

> "The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

It is now well settled that plaintiffs will not avoid the prohibition of this act by basing a claim upon 42 U.S.C. §1983, or the federal Constitution. *Hickman* v. *Wujick*, 488 F.2d 875 (2nd Cir. 1973). Nowhere in the complaint do plaintiffs assert that they lack a plain, speedy and efficient remedy in the state court system for their alleged injury (whatever that may be). Absent such a properly pleaded allegation this action is absolutely barred. *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F.2d 439 (7th Cir. 1975) *cert. den.* 423 U.S. 1073 (1976), *reh. den.* 424 U.S. 959, supplemental opinion 551 F.2d 1093 (7th Cir. 1977). Exhaus-

tion of state remedies is required prior to the filing of this action. *Kelly* v. *Springett,* 527 F.2d 1090 (9th Cir. 1975). Plaintiffs herein may raise as defenses to the pending state court suits any and all of their claims raised herein. Plaintiffs may file a declaratory and injunctive relief action in the Circuit Court of Cook County, raising all of their claims raised herein. Plaintiffs may pay future taxes under protest and sue for refunds. However, it is not this defendant's duty to tell plaintiffs how to litigate their state court claims and to prove their availability of such remedies when the plaintiffs fail to assert any inadequacies in those remedies.

The response of the plaintiffs to the ruling of the Court of Appeals is interesting. Simply put, they assert that this complaint which seeks to enjoin defendant Carey from suing to collect delinquent taxes is not a suit seeking to enjoin the collection of taxes because defendant Carey is not suing to collect all the outstanding taxes. How that keeps this action from being a suit to enjoin the collection of taxes is not clear. Plaintiffs also appear to make the argument that the pending State court actions are not attempting to collect taxes; rather, they are actions seeking to collect judgments based upon taxes and therefore, it is plain to see, are not suits to collect taxes. A prudent person might begin to suspect the presence of questionable reasoning.

Plaintiffs cite an Illinois case, *Douthett* v. *Winter,* 108 Ill. 300 (1884) to establish that the pending state actions are not an effort to collect taxes. The issue presented to the *Douthett* court was the applicability of the Homestead Act and its exemption. The Illinois court launched upon effort to distinguish between a suit seeking personal judgment based upon an underlying default on taxes and a "tax

sale," that is, the *in rem* proceeding versus the *in personam* proceeding. That decision was premised upon the holding of *Douthett* v. *Kettle,* 104 Ill. 356 (1882). The *Kettle* case held that the subsequent deficiency judgment, being an *in personam* action, forecloses the application of the two year redemption period.

Neither of these cases purports to hold that the state actions are not efforts to collect delinquent taxes due and owing. Rather, they dealt specifically with the application of homestead exemptions and redemption rights. It is farcical to assert that these state actions are anything other than efforts to collect delinquent taxes.

II.

THE COMPLAINT WHOLLY FAILS TO ALLEGE FACTS TO DEMONSTRATE THE PRESENCE OF ANY IRREPARABLE INJURY, THE ABSENCE OF WHICH FORECLOSES THE GRANTING OF EXTRAORDINARY RELIEF.

As pointed out in section I, it is difficult to imagine the injury to plaintiffs when they complain that they have been sued for the taxes accrued while they were owners but that past owners have not been sued for what they did not pay. The bottom line to this argument is that plaintiffs complain that the defendant herein has not yet sued everyone for all outstanding taxes in state court and therefore plaintiffs have been irreparably injured. Plaintiffs next claim that they have been irreparably injured because they have only been sued for general taxes and not for special assessments as well, this all to their serious disadvantage.

The answer, of course, is that because of applicable state case law, defendant Carey may only sue for general taxes, *City of East St. Louis* v. *State Trust Co.,* 372 Ill. 120 (1939).

Plaintiffs argue that the defendant breaches the law by not following a section of the law which has been declared illegal. Apparently if defendant Carey also sued for special assessments, plaintiffs would be satisfied. This, of course, would increase the amount of the judgment against the plaintiffs. It is hard to understand how plaintiffs are thereby better off and that for the want of this they are injured.

The argument is also made that the entire statutory scheme is unconstitutional because it does not mandate that every owner of each parcel of property in default on taxes be sued simultaneously. Suffice it to say that no tax collecting agency, including the Internal Revenue Service, is required by statute or constitutional law to have a pending claim against every defaulting taxpayer at one time. Taking into account the resources of government reasonably allocatable to such an effort, plaintiffs have utterly failed to demonstrate discriminatory enforcement. Plaintiffs herein are defendants to a few of the eighty-six (86) suits pending for collection of taxes as of April 21, 1977.

Plaintiffs appear to make an attempt at pleading an equal protection claim, the basis of which is unclear. Presumably it is premised upon the fact that at one time the class of persons owning the delinquent property were allowed to settle their taxes and these plaintiffs no longer can do so. Such an assertion constitutes 50% of a valid equal protection claim. The 50% which is entirely lacking (thereby causing the first 50% to fail to state a claim), is the necessary assertion that some class members are *presently* permitted to settle their tax bill under the old system whereas plaintiffs are not permitted to do so.

Plaintiffs have also raised the issue that the suits actually filed are in violation of state law because the County

Board has not authorized the actions. Besides this being a matter of state procedure (which wholly fails to raise a federal question), the issue has long been resolved. Section 5(1) of "An Act in regard to attorneys general and state's attorneys" states:

> "§5. The duty of each State's Attorney shall be:
>
> (1.) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal. . . . in which the people of the State or county may be concerned." Ch. 14, ILL. REV. STAT.

It is well established that the County Board has no power to lessen the statutory duty or authority of the State's Attorney. See *Wilson* v. *County of Marshall,* 257 Ill. App. 220 (2nd Dist. 1930). The Supreme Court rejected the contention that county board approval is required for the filing of suits to collect delinquent taxes by the State's Attorney. *People* v. *Kimmell,* 323 Ill. 261 (1926). See also the case of *County of Champaign* v. *Hanks,* 41 Ill. App. 3d 679 (1976). A federal suit to enjoin the collection of taxes for which there is a plain, speedy and efficient remedy is absolutely barred by 28 U.S.C. §1341. Plaintiffs herein can have their state and federal claims fully aired in the pending state actions while prompt and full review is afforded them from any adverse decision. Nothing more is required for 28 U.S.C. §1341 to come to bear on this suit.

III.

THE PLAINTIFFS-APPELLANTS HAVE ALLEGED NO FACTS THAT WOULD FORECLOSE THE APPLICATION OF *YOUNGER v. HARRIS* AND *HUFFMAN v. PURSUE* AND THE DISMISSAL OF THIS ACTION.

The case law dealing with abstention is well developed and clear. This present constitutional attack on the state

statute should first be presented to the state courts for determination. There are live, pending state court actions wherein the claims raised herein may be aired. The statute is not flagrantly and patently violative of express constitution prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it. *Huffman* v. *Pursue,* 420 U.S. 592 (1975). There is a complete lack of showing by plaintiffs that they have suffered any irreparable injury or that they have any injury which is both great and immediate. *Younger* v. *Harris,* 401 U.S. 37 (1971) Plaintiffs herein certainly have the opportunity to raise and have timely decided by a competent state tribunal the federal issues raised by this action. Mr. Justice Black stated in *Younger*:

> "it has been perfectly natural for our cases to repeat time and again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." [at 45.]

The present action attempts to do indirectly that which is clearly forbidden to do directly, i.e., enjoin the collection of taxes in a pending state action.

> "[T]he notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." [*Younger* at 44.]

The seriousness of federal judicial interference with state civil functions has long been recognized. *Massachusetts State Grange* v. *Benton,* 272 U.S. 525 (1926) stated a rule which "should be very strictly observed."

> "[N]o injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and immediate injury." [at 527.]

Where a state court has determined the validity of a state statute challenged on federal constitutional grounds, an appeal lies to the Supreme Court through 28 U.S.C. §1257(1). Plaintiffs should not have the luxury of litigating these issues in federal court where they may properly be raised in the pending state proceedings. The entitlement to litigate federal claims in a federal court is appropriate only when plaintiffs seek to *relitigate* their federal issues adversely determined in a completed state court proceeding. *Huffman, supra.* Declaratory and injunctive relief is uncalled for. *Judice* v. *Vail,* 97 S.Ct. 1211 (1977) holds that no more than an opportunity to raise the federal claims in a state proceeding is required to warrant abstention. See also, *Trainor* v. *Hernandez,* 97 S.Ct. 1911 (1977).

The state courts may well construe the statute in a manner as to eliminate plaintiffs' federal claims. Hence, this action is premature and require the Court to make constitutional adjudications that may well be unnecessary.

CONCLUSION

Plaintiffs admit the validity of the taxes but nevertheless ask this Court to enjoin their collection. That may not be done because of 28 U.S.C. §1341. Plaintiffs are not denied due process of law when they have an opportunity to appear and defend against the state actions. If there are un-

certainties to the state taxing procedures, they should be studied and clarified by courts which are best equipped to do so. Abstention is appropriate under these circumstances.

Respectfully submitted,

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602,
(312) 443-7940,

Attorney for Respondent.

PAUL P. BIEBEL, JR.,
Deputy State's Attorney,
Chief, Civil Actions Bureau,

JOHN A. DIENNER, III,
Assistant State's Attorney,

Of Counsel.

October 11, 1978